No. 06-766

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In The
Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONERS NEW YORK COUNTY DEMOCRATIC COMMITTEE, NEW YORK REPUBLICAN STATE COMMITTEE, ASSOCIATIONS OF NEW YORK STATE SUPREME COURT JUSTICES IN THE CITY AND STATE OF NEW YORK, HONORABLE DAVID DEMAREST, J.S.C.

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QUESTIONS PRESENTED

1. Party conventions are so deeply ingrained in this country's political history that in *American Party of Texas v. White*, 415 U.S. 767 (1974), this Court held that it is "too plain for argument" that a State may require intraparty competition to be resolved either by convention *or* primary. Did the Second Circuit err in effectively declaring delegate-based conventions unconstitutional by finding that voters and candidates have a right to associate directly?

2. What is the appropriate scope of First Amendment rights of voters and candidates within the arena of intraparty competition?

   (a) Did the Second Circuit err, as a threshold matter, in applying this Court's decision in *Storer v. Brown*, 415 U.S. 724 (1974) and related ballot access cases, which were concerned with the dangers of "freezing out" minor party and non-party candidates, to internal party contests?

   (b) If *Storer* does apply, did the Second Circuit run afoul of *Storer* in holding that voters and candidates are entitled to a "realistic opportunity to participate" in the party's nomination process as measured by whether a "challenger candidate" could compete effectively against the party-backed candidate?

3. Did the Second Circuit err in preferring the First Amendment rights of voters and candidates over those of political parties by subjecting New York's statutory scheme to strict scrutiny review rather than a balancing test that accords equal weight to the associational rights of political parties?

QUESTIONS PRESENTED – Continued

4. Did the Second Circuit err in imposing the drastic remedy of a mandatory injunction installing primaries in place of the convention system, effectuating the precise opposite of what the New York legislature intended?

PARTIES TO THE PROCEEDING

Petitioners are the New York State Board of Elections, Douglas Kellner, Neil W. Kellner, Helena Moses Donohue, Evelyn J. Aquila, the New York County Democratic Committee, the New York Republican State Committee, the Associations of New York State Supreme Court Justices in the City and State of New York, Justice David Demarest, individually, and as President of the State Association, and Andrew M. Cuomo, Attorney General of the State of New York.

Respondents are Margarita Lopez Torres, Steven Banks, C. Alfred Santillo, John J. Macron, Lili Ann Motta, John W. Carroll, Philip C. Segal, Susan Loeb, David J. Lansner, and Common Cause/NY.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, Pet. App. 1-92, is reported at 462 F.3d 161 (2d Cir. 2006), *cert. granted*, *New York State Board of Elections v. Lopez Torres*, 127 S. Ct. 1325 (2007).[1]

The opinion of the United States District Court for the Eastern District of New York, Pet. App. 93-191, is reported at 411 F. Supp. 2d 212 (E.D.N.Y. 2006), *aff'd*, 462 F.3d 161 (2d Cir. 2006), *cert. granted*, *New York State Board of Elections v. Lopez Torres*, 127 S. Ct. 1325 (2007).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 30, 2006. The petition for a writ of certiorari was filed on November 28, 2006, and was granted on February 20, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The constitutional and statutory provisions involved are annexed hereto as an appendix.

STATEMENT OF THE CASE

This case involves the constitutionality of the method of selection for all trial court judges of general jurisdiction throughout New York State. The lower courts declared unconstitutional on First Amendment grounds New York's 86-year-old statutory scheme used to nominate major party candidates, known as the judicial convention system, and mandated that this election method be replaced

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[1] "Pet. App. __" refers to the Appendix to the Petition for Certiorari; "JA __" to the Second Circuit Joint Appendix; "HE __" to Volumes 1-9 of the Second Circuit Record on Appeal; and "Tr. __" to Volume 10 of the Second Circuit Record on Appeal.

by direct primaries – the precise system which New York's legislature specifically rejected in 1921.

I. OVERVIEW AND HISTORY OF NEW YORK'S DELEGATE-BASED JUDICIAL CONVENTION

A. Origins Of The Judicial Convention

In 1846, New York amended its Constitution to provide for the popular election of judges sitting on its trial courts of general jurisdiction, known as the New York State Supreme Court. Pet. App. 9. In the absence of statutes providing otherwise, a party's judicial candidates for the State Supreme Court were chosen by the same method as other candidates for State office, which at the time, was by party convention. *Id.*

In 1911, during a nationwide wave of populism, the Legislature changed the law to provide for State Supreme Court nominations by primary election – a then relatively new mechanism for selecting candidates. Pet. App. 9. Over the next nine years, however, the reform met with widespread condemnation. Critics denounced the primary as burdensome and expensive, and warned that it facilitated the sale of judgeships to the highest bidder, thus threatening judicial independence. *Id.*

In response to these complaints, the Legislature, in 1921, restored the convention system. As representatives of the people and unpledged to any particular candidate, the locally-elected delegates would gather at party conventions for each Judicial District to nominate the party's candidate who would appear on the general election ballot in November. Pet. App. 10. In the view of the drafters of the 1921 legislation, conventions were a particularly fitting method for nominating judicial candidates because, as the Senate Report summarized, "It is inherent in the functions of the judicial office that the office should seek the man, and not the man the office." *Report of Special Comm. of Senate on Primary Law Submitted with Bill to Establish State Wide Judicial Conventions*, S. Doc. No. 34 at 3 (N.Y. 1918). Thus, after experimenting with both a

convention system and primary elections for trial judges, the New York Legislature made a deliberate and reasoned choice to employ nominating conventions instead of primaries to select candidates for the office of Justice of the Supreme Court of New York.

For the last 86 years, New York's legislature has stood by this considered choice, even as the merits of the judicial nominating convention have remained a subject of serious public debate. Pet. App. 10. Indeed, at New York's constitutional convention in 1967, a proposal to replace the judicial convention with primaries was extensively debated, but ultimately rejected. Likewise, in 1973, the Joint Legislative Commission on Court Reorganization recommended that the convention system should remain in place. *See Report of the Joint Legislative Comm. On Court Reorganization,* Legis. Doc. 24 at 12 (1973). Most recently, in February 2006, the New York State Commission to Promote Public Confidence in Judicial Elections (the "Feerick Commission") concluded, as the Legislature did in 1921, that conventions are preferable to primaries for nominating candidates for the office of Justice of the Supreme Court of New York. *See* Commission to Promote Public Confidence in Judicial Elections, *Final Report to the Chief Judge of the State of New York* at 3 (February 6, 2006) (the "Feerick Report").[2] As the Feerick Commission noted, "primaries pose a great risk of attracting substantial increases in partisan spending on New York State judicial campaigns, which, as our research clearly shows, would serve to further undermine confidence in the judiciary." *Id.* Nominating conventions, by contrast, "facilitate access to a place on the ballot for non-majority candidates . . . allow members of geographic and other minority factions to build coalitions to win a spot on the ballot[,] . . . [and] allow candidates to avoid the high cost of conducting primary campaigns in judicial districts." *Id.* at 30. Accordingly, the report concluded, "without public financing of

[2] Available at http://www.law.fordham.edu/commission/judicialelections/images/jud-finreport/pdf.

judicial elections, the judicial nominating convention system should be retained rather than replaced by primary elections." *Id.* at 11.

B. The Convention Framework

The New York Constitution divides the state into twelve Judicial Districts from which candidates for Justice of the Supreme Court of New York are nominated and elected. N.Y. Const. art. VI, §6(a), (b) Pet. App. 11, 101. Each Judicial District, in turn, includes a number of smaller Assembly Districts, the same political subdivisions from which New Yorkers elect their representatives to the State Assembly. The delegates who will later attend the Judicial District's nominating convention are elected at the Assembly District level in party primary elections held in September. Pet. App. 11, 101, 104. The number of delegates for each Assembly District is governed by each party's internal rules. The Election Law requires that the allotted number of delegates for each Assembly District be substantially proportional to the percentage of total votes cast in that Assembly District for the party's gubernatorial candidate in the last general election. Pet. App. 11-12, 104-105.

Any enrolled member of a recognized political party residing within the Judicial District may run for delegate. To get on the primary ballot, a prospective delegate need only gather 500 valid signatures from enrolled party members in the Assembly District during the petitioning period in the spring. Pet. App. 12, 108. Delegates are independent agents who are free under New York law to exercise their own discretion to vote for the candidates of their choice.[3] In practice, because delegate is a party

[3] *See* Tr. 881:6-11 (Keefe) (admitting that delegates can vote for any candidate they want). Plaintiffs' expert, Dr. Cain, also acknowledged that a "[d]elegate is free to do as he or she sees fit." Tr. 310:19 (Cain). All of the witnesses who served as delegates, including Plaintiffs' own witnesses, testified that no party leader ever instructed, much less coerced, them to vote for a particular judicial candidate and they

(Continued on following page)

position, local community-based organizations that actively participate in the party, such as political clubs or party committees, are involved in endorsing candidates for these offices and gathering petition signatures.[4] On delegate primary day in early September, registered party members in each Assembly District vote for delegates among those who have met the signature requirement to gain a place on the ballot.[5]

In late September, two or three weeks after delegates are selected, the political parties hold their judicial nominating conventions. Pet. App. 18 (citing N.Y. Elec. L. §§6-124, 6-126, 6-158(5)). At the convention, any delegate may nominate any judicial candidate, and, once this process is complete, the delegates vote for as many nominees as there are open Supreme Court seats in that Judicial District. Because delegates are generally called upon to fill multiple vacancies from an array of judicial candidates, delegates are not intended to be pledged to any particular judicial candidate. *See* Pet. App. 107.

Although the judicial nominating convention is convened just two to three weeks after delegates are selected, judicial candidates may campaign for their party's nomination for at least nine months. During the

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always could nominate the candidate of their choice. Tr. 521:3-22; 540:13-541:7 (Carroll); Tr. 235:9-14 (Berger); Tr. 1261:25-1262:6 (Schiff); Tr. 1333-11-1335:4 (Ward); Tr. 1583:10-13; 1583:18-20 (Kellner); Tr. 1986:25-1987:2; 1993:17-19 (Giske); Tr. 1947:11-20 (Levinsohn); Tr. 2035:22-2036:4, Tr. 2036:1[illegible]21 (Allen); Tr. 2088:12-22 (Connor). Indeed, a number of these witnesses, testified that they had voted against the county leader's preferred candidate. *See e.g.*, Tr. 1583:21-25 (Kellner); 1333:11-1335:4 (Ward).

[4] Tr. 1557:20-25 (Kellner); Tr. 1984:6-1985:6 (Giske); JA 346 (Levinsohn Decl. ¶ 16). But any rank-and-file party member can run for the office of delegate. Tr. 1554:3-6 (Kellner); Tr. 168:12-18 (Berger).

[5] If the number of delegate candidates is less than or equal to the number of available positions in that Assembly District, then the candidates are all deemed elected, and the Assembly District does not hold a needless election.

campaign season, many candidates appear at various events attended by rank-and-file members, party leaders and potential delegates.[6] The names of candidates running for delegate and alternate delegate are publicly available by July.[7] Thus, judicial candidates can readily contact delegates to lobby their support. Six sitting Justices testified below that through hard work and perseverance they were able to gain delegate support, win the nomination, and then win a Supreme Court seat.[8] Indeed, although she did not win her party's nomination, lead plaintiff Lopez Torres was able to garner 25 delegate votes out of 91 cast (with three abstentions), falling 21 shy of a majority. Tr. 612-15 (Lopez Torres).

Contests among judicial candidates for the nomination are often waged in the pre-convention period and generally resolved before the convention opens, much like national party conventions for presidential candidates. Tr. 1566:9-14, 1577:8-1578:7 (Kellner). As a result, the conventions themselves are typically uneventful and the minutes record the nominations as unopposed or affirmed by unanimous voice vote. JA 388 (Giske Decl. ¶ 16); Tr. 1577:18-20 (Kellner); Tr. 2092:10-2093:21 (Connor).

C. The General Election

The last step of the selection process for Supreme Court Justice is the general election in November. On

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[6] *See* Tr. 1308:22-1309:6; 1309:18-25 (Schiff); *Code of Jud. Cond.*, 22 N.Y. Comp. Codes. R & Regs. §100 Q; Tr. 1572:12-18 (Kellner); HE 6797 (Lunn Dep. Tr. 83:14-24); Tr. 1773:8-24; 1754:3-1756:9; 1760:23-1764:23 (Freedman).

[7] *See* Tr. 1785:22-1786:16 (Freedman); Tr. 1572:4-8 (Kellner); *see also* Tr. 507:15-509:16 (Carroll).

[8] *See* HE 6784-90; 6794; 6803; 6805 (Lunn Dep. Tr. 31:21-46:14; 49:22-50:14; 53:21-56:15; 72:24-73:13; 107:9-109:25; 115:14-116:11); JA 128-29 (Sise Decl. ¶ 9); Tr. 1487:3-1493:15; 1498:12-1504:21 (Sise); Tr. 1754:16-1770:12 (Freedman); Tr. 1963:22-1968:8 (Schlesinger); Tr. 1812:16-1814:17; 1814:21-1815:13; 1816:15-20; 1823:7-1824:10 (Gangel-Jacob); Tr. 1858:18-1860:1; 1866:14-1869:18; 1881:8-1885:3 (Abdus-Salaam).

election day, all registered voters in New York State have an opportunity to vote for the office of Justice of the Supreme Court of New York within their respective Judicial Districts. Voters may choose from among the nominees selected at each party's convention, as well as any other candidate who has achieved ballot position through the alternative routes to the general election ballot. Indeed, in addition to seeking the nomination of a major political party, New York's challenged statutory scheme affords any would-be judicial candidate the option of: (1) petitioning directly onto the general election ballot under N.Y. Elec. L. §6-138 by gathering 4,000 signatures (or 3,500 outside of New York City); (2) running as a minor party candidate under N.Y. Elec. L. §1-104; or (3) having a vote cast for them as a write-in candidate under N.Y. Elec. L. §§7-104(7) and 7-108(8). The Second Circuit does not deny that candidates have a "reasonable means of general election ballot access" *via* these alternative routes. Pet. App. 57.

II. FOR TWO CENTURIES OF AMERICAN POLITICAL LIFE, CONVENTIONS HAVE SERVED THE BENEFICIAL FUNCTION OF MEDIATING THE PREFERENCES OF PARTY MEMBERS

Since their inception in the early nineteenth century, conventions have served the beneficial purpose of mediating the preferences of rank-and-file party members through the informed determinations of delegates and local party leaders. Conventions were not designed to be the functional equivalent of primaries. Instead, their mediating structure makes them a better associational mechanism for parties to select nominees who represent their interests, preserving party unity and maximizing their chances in the general election.

In the first third of the nineteenth century, local party groups across the country instituted the nominating convention as "the best means of concentrating the popular will, and giving it effect." Paul David *et al.*, *The Politics*

of National Party Conventions 56 (1984). The very structure of the nominating convention, in which party members at a primary elect delegates, who then convene to select the party's candidates, was not designed to give rank-and-file party members a direct voice in nominations, or to encourage candidates to appeal directly to rank-and-file members. Howard Penniman, *Sait's American Parties and Elections* 279-81 (4th ed. 1948). Instead, nomination decisions were filtered through delegates.

Traditionally, conventions put delegates "two or even three degrees" removed from rank-and-file party members. 2 Moisei Ostrogorski, *Democracy and the Organization of Political Parties* 121 (1964). In this intricate, multi-layered system, it was impractical for candidates to canvass enough voters in every district to ensure the election of a majority of delegates committed to their nomination, nor were they expected to make the attempt. *See* Emanuel Philipp, *Political Reform in Wisconsin* 101 (1910) ("[I]t frequently occurred that candidates were nominated who had not spent one cent to advance their own interests.").

Indeed, any attempt at "'packing' . . . [delegate] primaries in the interest of certain candidates" was seen as an "evil." Frederick W. Dallinger, *Nominations for Elective Office in the United States* 125 (1897). The duty of rank-and-file members was to vote for "honest, intelligent, and public spirited delegates," not to choose on the basis of "meddling" by candidates. John Francis Reynolds, *The Demise of the American Convention System, 1880-1911* 67 (2006). Each delegate was responsible for choosing candidates for many offices. Pledged delegates were unusual, and "it was rarely clear where any prospective delegate stood with respect to candidacies or causes." Reynolds at 29; *see also* Dallinger at 127. Because delegates were not pledged to candidates, rank-and-file members could not choose candidates by voting for particular delegates – and, accordingly, the rank-and-file members generally did "not trouble themselves speculating about the nominees." Reynolds at 29.

The conventions themselves focused on creating a "slate" of nominees who would best represent the party's interest, not on advancing the ambitions of individual candidates. It was a common and encouraged practice for groups of delegates to bargain over the slate, "throwing over some of their candidates and entering into a reciprocal agreement for the rest," thus building the strongest ticket for the party. Ostrogorski at 126; *see also* Dallinger at 70. And, as at the delegate primaries, candidates were not expected to participate; they usually "did not show up" at the conventions, and their occasional presence was considered "unsettling" and "awkward." Reynolds at 69-70.

By design, party leadership heavily influenced the entire convention process. As a Senate committee on nominating conventions remarked in 1838, "it was not merely the right but the duty of office-holders to . . . influence and to direct the people in the choice of their representatives." Ostrogorski at 40. At the delegate primaries, a "slate" of delegates was generally "settled beforehand" by the party committee, the "controlling power" of each local party organization. Ostrogorski at 113-14. This "'slate' prepared by the local committee" was "apt to be successful," Dallinger at 60, and any "competitive contest for delegate seats" was seen as "detrimental to party unity," Reynolds at 28-29. Absent dissent within the party on nominations, the conventions themselves were frequently uneventful as "the proceedings are all settled beforehand." Ostrogorski at 125. Parties considered this "harmony" at conventions to be ideal. Reynolds at 46.

Delegate conventions have enjoyed a long history as the mechanism for nominating presidential candidates. In 1860, Abraham Lincoln worked to get his name on the ballot through local and statewide conventions by courting support among party leaders to secure the Republican party nomination. Doris Kearns Goodwin, *A Team of Rivals: The Political Genius of Abraham Lincoln* 224-36

(2005). In 1932, Franklin Delano Roosevelt was nominated at the Democratic National Convention by delegates, many of whom were selected by methods other than primaries. Richard Bain & Judith Parris, *Convention Decisions and Voting Records* 240 (2d ed. 1973). In 1952, the Republican party nominated Dwight Eisenhower over Senator Robert A. Taft despite Taft's having won the largest number of candidate preference primaries. David B. Truman, *Party Reform, Party Atrophy, and Constitutional Change: Some Reflections*, 99 Pol. Sci. Q. 637, 639 (1984-85). The party leaders saw Eisenhower as a far better vote getter in the general election than Taft, although the latter was "Mr. Republican." Byron E. Shafer, *Anti-Party Politics*, 63 Pub. Int. 95, 96 (Spring 1981).

As of 1952, approximately fifty-five percent of the delegates to the Democratic and Republican national conventions were chosen through party conventions and other party organization processes. Paul T. David, Ralph Goldman & Richard Bain, *The Politics of Party Conventions* 249 (1960). It was widely recognized that "in only a few states [did] the voter have a direct voice in the choice of delegates to the national convention." Hugh A. Bone, *American Politics and Party System* 309 (3d ed. 1965). Until 1972, about 60 percent of states "used some sort of open meetings other than primaries" for the purpose of picking delegates to the national convention. Robert B. Denhardt & Jay E. Hakes, *Delegate Selection in Non-Primary States*, 63 Nat'l Civic Rev. 521, 521 (1974). And through 1972, the Democratic Party had no requirements that delegates vote for a particular candidate on the first ballot. Congressional Quarterly, *National Party Conventions 1831-2000* 27 (2001).

Following the 1968 Democratic National Convention, the McGovern Commission found that thirty-two states and territories selected their delegates through a state convention. George McGovern, *Democratic National Commission on Party Structure and Delegate Selection, Mandate for Reform, reprinted in* 117 Cong. Rec. 32909, 32911 (1971). In twenty-one of these states, rank-and-file party members attended the convention and selected their

delegates; in six, party officials chose the delegates at the convention; and in five, both methods were used. In four states, the party committee selected the delegates. In four other states, party committees selected a portion of the delegation. Indeed, the entire delegations of Georgia and Louisiana were appointed by the governors of those states; in Arizona, Arkansas, Maryland and Rhode Island, as well as in Puerto Rico, all the delegates, and in Oklahoma, New York, Pennsylvania, and the State of Washington, from one-third to one-half the delegates, were named by the state party committee. Alexander M. Bickel, *Reform and Continuity: the Electoral College, the Convention, and the Party System* 40 (1971). The McGovern Commission further found that "in at least 20 states, there were no (or inadequate) rules for the selection of Convention delegates, leaving the entire process to the discretion of a handful of party leaders." McGovern at 32909. While the McGovern Commission found that there were problems with the convention system, it nevertheless determined "the National Convention was an institution well worth preserving." *Id.* at 32910.

In the twentieth century, primaries became the most popular method of nomination chosen by state legislatures. Yet conventions remain in wide use today. *See generally* Council on State Governments, *Book of States* Vol. 38 at 272-73 (2006). In at least thirty-two states, election laws currently require or allow some use of conventions.[9] Several

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[9] *See* Ala. Code §17-13-2; Ariz. Rev. Stat. §16-342; Ark. Code Ann. §7-7-104; Colo. Rev. Stat. §1-4-701, §1-4-103, §1-4-1304; Conn. Gen. Stat. §9-451, §9-382; Del. Code. tit. 15, §3113; Fla. Stat. §99.0965; Ga. Code Ann. §21-2-180; Idaho Code §34-707; 10 Ill. Comp. Stat. 5/7-9; Ind. Code Ann. §3-8-4-10, §3-8-4-2; Iowa Code §43.65, §43.78; Kan. Stat. Ann. §25-202; Ky. Rev. Stat. §118.105; Me. Rev. Stat. tit. 21-A, §321; Md. Code. Ann., Elec. §5-703.1; Mich. Comp. Laws Const. art. V, §21; Neb. Rev. Stat. §32-710, §32-616; N.H. Rev. Stat. Ann. §667:21; N.M. Stat. Ann. §1-8-2; N.Y. Elec. L. §6-106; N.D. Cent. Code §16.1-13-14; Ohio Rev. Code Ann. §3513.11; Or. Rev. Stat. §248.009; R.I. Gen. Laws §17-12-13; S.C. Code Ann. §7-11-10, §7-11-30; S.D. Codified Laws §12-5-21; Tenn. Code Ann. §2-13-203; Tex. Elec. Code §181.002, §181.003;

(Continued on following page)

states encourage further experimentation by parties by allowing them to choose their nominating mechanism.[10] Other states, to preserve party unity and prevent the splintering of support over several candidates, have hybrid systems combining elements of direct primaries and conventions. In Iowa, if no candidate receives at least 35 percent of the vote in a direct primary, then a party convention nominates the candidate for that office. Iowa Code §§43.65, 43.78. In Colorado, candidates must receive at least 30 percent of the votes at a convention to be placed on the primary ballot. Colo. Rev. Stat. §1-4-103. In Connecticut, conventions choose candidates who then run in direct primaries as party-endorsed. Conn. Gen. Stat. §9-382.

To cut down on the burdens to the state and candidates, and to maintain party unity, several states require or allow minor parties to nominate by convention. *See e.g.*, Colo. Rev. Stat. §1-4-1304; Fla. Stat. §99.0965; Tex. Elec. Code §§181.002, 181.003. Other states, to encourage more diverse and better-qualified candidates, use conventions to nominate for certain offices. *See e.g.*, Ind. Code Ann. §3-8-4-2; Mich. Comp. Laws Const. art. V, §21; S.D. Codified Laws §12-5-21. New York is among these, using conventions to nominate judges. N.Y. Elec. L. §6-106. Finally, many states use conventions to fill vacancies in nominations or to write party platforms and select party officers. *See e.g.*, Ariz. Rev. Stat. §16-342; Idaho Code §34-707.

III. PROCEEDINGS BELOW

Plaintiffs, individual voters and would-be Supreme Court candidates, brought this action on March 14, 2004, against the New York State Board of Elections (the "Board of Elections") for declaratory and injunctive relief challenging the constitutionality of New York's judicial convention system and seeking permanent injunctive relief

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Utah Code Ann. §29A-9-404; Va. Code Ann. §24.2-509; Wash. Rev. Code §29A.20.121.

[10] *See e.g.*, Ala. Code §17-13-2.

installing a primary system in its place. Pet. App. 30-31. On June 9, 2004, Plaintiffs filed a motion for a preliminary injunction seeking to enjoin the Board of Elections' enforcement of the three New York State Election Law statutes codifying the convention system, N.Y. Elec. L. §§6-106, 6-124 and 6-158, on grounds that they deny citizens and candidates equal protection under the law, and violate the First and Fourteenth Amendments. *See* Pet. App. 31.

The Attorney General of the State of New York appeared as statutory intervenor in defense of the challenged statutory provisions. As parties directly affected by the action, the following intervened as Defendants: the New York County Democratic Committee, the New York Republican State Committee, the Association of Supreme Court Justices of the State of New York, the Association of Supreme Court Justices of the City of New York, and Justice David Demarest, individually, and as President of the State Association. Pet. App. 31.

A. The District Court's Mandatory Injunction

On January 26, 2006, the United States District Court for the Eastern District of New York issued its decision declaring the convention system unconstitutional and issuing a mandatory injunction barring enforcement of N.Y. Elec. L. §6-106 and use of the procedures set forth in N.Y. Elec. L. §6-124 and directing that primary elections be held for major party candidates until the Legislature adopts a new statutory scheme. Pet. App. 31, 95-96, 183-184.

The district court held that New York State's convention system violates the First Amendment, concluding that major party leaders, not delegates or voters, control who becomes a New York Supreme Court Justice. Pet. App. 95.

Defendants filed a notice of appeal on February 7, 2006, and in light of, among other things, the immediate impact that the district court's decision would have on incumbents running for re-election in November 2006, moved the district court for a stay pending appeal. On

March 3, 2006, the district stayed its decision pending appeal. Pet. App. 33. On March 14, 2006, the United States Court of Appeal entered an order expediting the appeal. Pet. App. 33. On March 1, 2007, the district court extended the stay in light of the Court's grant of certiorari.

B. The Second Circuit Opinion

On August 30, 2006, the Second Circuit affirmed, holding that the district court (1) properly concluded that Plaintiffs demonstrated a clear likelihood of success on the merits of their First Amendment claim; (2) properly enjoined the judicial nominating convention; and (3) appropriately required that party nominations proceed *via* direct primary election until the Legislature enacts a new nominating mechanism.

The Court of Appeals first determined that the First Amendment applies to the nominating phase (an issue never in dispute) and concluded that New York must afford "voters and candidates the right to associate through and in the judicial nominating process." Pet. App. 41. In expounding on the scope of this purported right, the Court of Appeals held that candidates and voters alike must have "a *realistic opportunity* to participate in the nominating process." Pet. App. 41, 44 (emphasis added).

In measuring whether the convention system satisfies that standard, the Second Circuit followed the district court in viewing the nominating process through the lens of a "challenger candidate," defined as "a reasonably diligent candidate who, although possessing public support, lacks the resources provided by a supportive political party and has no other means of overcoming the burdens that the system imposes." Pet. App. 60. The Second Circuit claimed to find support for the "challenger candidate" paradigm in this Court's decision in *Storer v. Brown*, 415 U.S. 724 (1974), where the relevant inquiry was whether "a reasonably diligent *independent* candidate [can] be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot." Pet. App. 60.

In applying the *Storer* test to the context of intraparty competition, the Court of Appeals determined that the burdens imposed by the convention system were severe. The court supported this conclusion based on the district court's finding that, under New York's delegate-based convention system, the possibility of successfully lobbying party-backed delegates is "non-existent" and "challenger candidates" can never satisfy the signature requirements for running their own pledged delegates in each Assembly District. Pet. App. 45.

SUMMARY OF ARGUMENT

1. The Constitution grants states broad authority to structure elections in the manner of their choosing. For two centuries and continuing today, states have used that authority to enact laws directing or permitting political parties to select their candidates for office through delegate-based conventions. Conventions have such a well-established place in American politics that in *American Party of Texas v. White*, 415 U.S. 767, 781 (1974), the Court held that it was "too plain for argument" that states may require that intraparty competition be resolved by convention or primary. When the Court examined the process of conducting national political conventions in *Cousins v. Wigoda*, 419 U.S. 477 (1975) and *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), it upheld the rights of parties to establish their own rules for delegate selection and voting, which rules did not give rank-and-file members the right to vote for candidates directly. Thus, contrary to the Second Circuit's view, the First Amendment does not require state legislatures that make the policy choice to prefer delegate-based conventions over primaries to make such conventions the functional equivalent of primaries. In light of the intended roles of the participants in this process, in which rank-and-file members vote for delegates and locally elected delegates choose candidates, New York's statutory scheme imposes minimal, if any, burdens on the right to vote.

2. A central flaw in the Court of Appeals' analysis is its misguided attempt to fit the square peg of a convention into the round hole of ballot access cases involving primaries and general elections. The principal cases upon which it relies, such as *Storer v. Brown*, 415 U.S. 724 (1974), involved the efforts of independent candidates or minor parties to qualify for ballot position, a context where the concern is to safeguard against "freezing out" alternate viewpoints. No such concern exists in intraparty struggles. Even if the Court were to draw an analogy to these cases, the equivalent of ballot access is merely convention access, which all candidates (including the lead plaintiff here) clearly have. But the Court of Appeals required far more, holding that so-called "challenger candidates," defined loosely as those lacking party leader support, must have a "realistic opportunity to participate." Pet. App. 44-45. The Court has never recognized a challenger candidate paradigm; to the contrary, in *Clements v. Fashing*, 457 U.S. 957, 963 (1982), the Court held that there is no constitutional right to run for office in the first place. Nor has the Court ever held that candidates are entitled to a realistic opportunity to participate, which is a judicially unmanageable standard that could only be measured by election outcomes. In the Second Circuit's mistaken view, the standard it crafted could only be met if challenger candidates could *succeed* in either convincing delegates to nominate them in lieu of the party leadership's choice, which is tantamount to winning the nomination, or in running their own pledged delegates, which completely subverts the design of a delegate-based convention by turning it into the functional equivalent of a primary. Given that there is no right to win a party nomination and no right to a primary, the Second Circuit's conclusion is plain error.

3. Where a law implicates competing constitutional rights, the Court balances the interests at stake, eschewing the application of strict scrutiny. The Second Circuit committed fundamental error by applying strict scrutiny to New York's judicial convention system in a one-sided fashion that favored challenger candidates and their

supporters in derogation of the constitutionally protected associational rights of political parties. The associational freedoms of parties are at their zenith when it comes to the selection of candidates. As the Court observed in *California Democratic Party v. Jones*, 530 U.S. 567, 575 (2000) (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1980)), "our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'" Conventions provide parties an inimitable opportunity to assemble and pursue their collective interests by developing balanced tickets of candidates who will represent their diverse constituencies and best advance party goals in the general election. Measured against the weighty party associational rights which would suffer greatly if the Second Circuit's decision abolishing New York's convention system were upheld, the burdens on voters and candidates of preserving the system are slight. Rank-and-file members are free to vote for delegates of their choice, there are no significant barriers to running for delegate, delegates are free to vote as they wish and candidates can solicit the support of delegates. In balancing the relative burdens, the Court should give considerable deference to New York's legislature, which specifically adopted the convention system after an unsatisfactory experience with primaries.

4. In affirming a sweeping injunction which dismantled New York's convention system in its entirety and installed a primary system in its place, the Second Circuit disregarded this Court's directive in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 383, 397 (2006), that courts tailor the remedy to the perceived constitutional infirmity. Here, where New York's legislature made a deliberate choice to institute judicial conventions in place of primaries, the lower courts erred by imposing a drastic remedy that was directly counter to the legislature's intent.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT ESTABLISH A RIGHT TO A PRIMARY AND, FOR TWO CENTURIES, CONVENTIONS HAVE BEEN RECOGNIZED AS A CONSTITUTIONALLY PERMISSIBLE METHOD OF SELECTING CANDIDATES

A. The Constitution's Broad Grant Of Authority To States Over Elections Permits Them To Choose A Representative Form Of Democracy And The First Amendment Must Be Viewed In Light Of The Intended Roles Of The Participants

The Constitution grants states plenary authority over the "Times, Places and Manner of holding Elections." U.S. Const. art. I, §4, cl. 1; *see also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). There is no requirement that states employ any particular method to choose their judges or that they be elected at all. Rather, the Constitution deliberately leaves to the states, as "laboratories" of democracy, the right to provide for the selection of judges in the manner of their choosing. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Thus, states have adopted a wide array of different judicial selection systems across the country, including pure appointments, partisan elections, non-partisan elections and hybrid systems, none of which are unconstitutional *per se*.[11] New York's judicial convention system rests comfortably within this broad spectrum, relying on basic principles of representative democracy.

Such representative or delegated forms of democracy are deeply embedded in the text of the Constitution itself. For example, prior to the adoption of the Seventeenth

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[11] Tr. 742:12-744:25; JA 275-76 (Schotland Decl. ¶¶ 10-14).

Amendment in 1913, Article I Section III provided that state legislatures, not voters, select each state's Senators. Likewise, Article II, Section I provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . " who choose the President and Vice President of the United States. *See generally* Stephen Breyer, *Active Liberty* 22-26 (2005). It defies imagination that the Framers, having inscribed delegate-based selection systems into the original text of the Constitution in two critical places, would have intended the First Amendment to preclude states from adopting them.

It is certainly true that "[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles," *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002). But nothing in the United States Constitution requires that once a state decides to make an office elective, the electoral system must ratify the direct and unmediated preferences of a plurality of voters. Rather, the critical threshold question becomes what are the roles that have been granted by the states? Here, New York's legislature only gave voters the limited role of voting for delegates and gave delegates the role of choosing candidates. Voters have an unfettered right to vote for the delegates of their choice. Delegate candidates have an unburdened path to seek that position and, once elected, delegates are free to vote their consciences. Finally, judicial candidates are not excluded from the process but are free to vie for the nomination by seeking delegate support. Viewed from the proper perspective of each participant's intended role in the process, New York's judicial nominating convention imposes only a negligible, if any, burden on First Amendment rights.

B. The Second Circuit's Decision Conflicts With This Court's Precedents, Which Embrace Conventions As A Constitutional Alternative To Direct Primaries For Selecting Candidates

In *American Party of Texas v. White*, 415 U.S. 767, 781 (1974), the Court held that it is "too plain for argument" that the state may require intraparty competition to be resolved either by convention *or* primary. The Second Circuit's decision, which mandates a primary in lieu of party convention for the nomination of judicial candidates, conflicts with *White* and other rulings of this Court, and calls into question this historically rich and enduring political process.

The Second Circuit's overly expansive view of the First Amendment as affording "voters and candidates the right to associate through and in the judicial nominating process," Pet. App. 41, effectively requires that rank-and-file voters have a direct vote in the selection of a party's nominee. This erroneous view dictates the equally erroneous result that forms of representative democracy, like the delegate-based convention at issue here, cannot pass constitutional muster because they do not involve direct appeal to voters. If permitted to stand, the Second Circuit's ruling would eviscerate this Court's holding in *White* by requiring as a practical matter that all nominations proceed by primary. In doing so, conventions for state, local and national office would be placed in jeopardy.

In *White*, the Supreme Court rejected a challenge to a Texas ballot qualification sy[illegible]n under which the major political parties were requir[illegible] nominate candidates by primary elections, smaller p[illegible]s could use either primaries or nominating conventions, and new and even smaller parties had to use precinct nominating conventions. 415 U.S. 767. Justice White, writing for seven other Justices, stated: "[i]t is too plain for argument . . . that the State may [properly] limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by

primary election or by party convention." *Id.* at 781 (citing *Storer v. Brown*, 415 U.S. 724, 733-36 (1974)); *see also Trinsey v. Commonwealth of Pa.*, 941 F.2d 224, 234 (3d Cir. 1991) (upholding use of party convention in lieu of primary to nominate Senate candidate for vacancy election).

This Court has recognized that it is an appropriate and beneficial function of a convention within a party structure to mediate the direct preferences of its rank-and-file members through delegates. In fact, in *Cousins v. Wigoda*, 419 U.S. 477, 480 (1975), this Court upheld the seating of a slate of delegates chosen at a private caucus over one popularly elected through a primary. In *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), this Court upheld the right of delegates to exercise independence and to not vote in accordance with primary results when doing so violated party rules. Similarly, lower courts have followed these precepts, recognizing that a party can choose to adopt a closed, delegate-based convention system, in which voters have "no direct voice" and their preference may only be "partially translated into the actual nomination" as "popular" support may not be "wholly determinative of the outcome":

> standing between the individual voter and the eventual nomination of a candidate may be numerous party rules and procedures so that the will of the majority of the electorate expressing a . . . preference[,] and the selection of delegates[,] may be only partially translated into the actual nomination. A finding that . . . a right to participate in a popular primary election does not foreclose party limits on the effective weight of [that] participation, or mandate that the popular ballot is to be wholly determinative of the outcome of the nomination process. Indeed in many states, delegates to the national convention are selected by means other than a primary election, so that many . . . [voters] have no direct voice in the selection of delegates.

Bachur v. Democratic Nat'l Party, 836 F.2d 837, 842 (4th Cir. 1987).

White's holding that a convention is a constitutional alternative to a primary, and *Cousins'* and *La Follette's* vindication of delegate rules that markedly depart from popular preference, would be rendered meaningless if, as the Second Circuit required, a convention must be the functional equivalent of a direct primary. No true convention system could be constitutional under that extreme view of the First Amendment for the very reason that it places delegates between voters and candidates. The Second Circuit's theory is that New York "must afford voters and candidates the right to associate through and in the judicial nominating process" and that "the First Amendment prohibits a state from maintaining an electoral scheme that in practice excludes candidates, and thus voters, from participating in the electoral process." Pet. App. 41, 44.[12] This theory, however, is built upon the flawed premise that the delegate-selection stage is intended to give rank-and-file voters a direct say in who the nominees of their party will be. It is not. Rather, New York's legislature made the deliberate policy choice to give delegates, not voters, the responsibility for selecting party nominees. *See Cousins*, 419 U.S. at 489 ("Delegates perform a task of supreme importance . . . [t]he vital business of the Convention is the nomination of the Party's candidates."). The only direct say voters have in this process is in the selection of the delegates who serve as voters' party representatives in the judicial nominating process. The First Amendment rights of individual voters are thus fully secured when they are given the opportunity to vote for delegates of their choice. *See id.* ("respondents overlook the significant fact that the *suffrage was exercised at the*

[12] *See also* Pet. App. 166 (as the district court, put it "more open and effective participation by voters must be allowed at the nomination stage, and candidates must be permitted an effective means of appealing to the voters when it counts.").

primary election to elect delegates to a National Party Convention") (emphasis added).

The Legislature could have chosen to give voters such a direct role. Or it could have chosen by statute to provide for selection of judicial nominees by appointment by party leaders without any role for delegates. It chose instead an intermediate route of establishing a judicial convention with features of a primary and a convention, and it was entitled to make that choice. Thus, at its core, the practices which the circuit court held to be a severe burden on voters' rights to vote and associate were simply the "network of facially innocent provisions," Pet. App. 44, which comprise a *convention system* where delegates elected to serve as party representatives, not rank-and-file party members, choose candidates.

II. VOTERS AND CANDIDATES HAVE AT MOST A CONSTITUTIONAL RIGHT TO ACCESS THE STATE'S NOMINATION SYSTEM, NOT A RIGHT TO A REALISTIC CHANCE OF WINNING

In determining the scope of First Amendment rights at the nomination phase, the Second Circuit declared that judicial candidates and voters must have a "realistic opportunity to participate" in New York's judicial nominating system. Pet. App. 41-44. Applying this amorphous standard, the Court of Appeals viewed the system through the distorted lens of a so-called challenger candidate, defined as "a reasonably diligent candidate who, although possessing public support, lacks the resources provided by a supportive political party and has no other means of overcoming the burdens the system imposes." Pet. App. 60. Under this framework, the Second Circuit upheld the district court's conclusion that the system unduly burdens First Amendment rights because, in practice, challenger candidates never succeed in running their own pledged delegates or lobbying party-affiliated delegates. Pet. App. 45.

But there is no support for a "meaningful participation" standard in this Court's long line of ballot access cases. Such a standard potentially invites federal courts to plumb the waters of electoral politics to assess whether disfavored candidates have a chance to win under any election scheme – a hazardous exercise with no clear guidance. And the Second Circuit's decision wrongly injects a standard – the *Storer* test – designed to measure ballot access for minor and independent party candidates at the general election into the arena of intraparty competition. The *Storer* strand of ballot access cases is concerned with laws that "freeze out" minor parties and independent candidates from gaining access to the general election ballot, granting the two major parties an effective monopoly on political participation. The Second Circuit's ruling rests on the assumption that *Storer's* "reasonably diligent independent candidate" standard applies to an internal conflict within a *party* – an entirely different context where there is no concern that different political viewpoints will be silenced. *See* Pet. App. 41-44.

Storer's test for ensuring minor party and independent candidate access to the general election ballot does not apply to intraparty nomination contests, where parties select their candidates for the general election. But even if *Storer* could be applied in the intraparty context, a sensible extension of *Storer* might establish the right of candidates to access the nominating system – it would (and should) do nothing to improve a candidate's long odds of winning against more established candidates within the party. That is simply a reality of elective politics and federal courts should be loath to wade into that "political thicket." *Vieth v. Jubelirer*, 541 U.S. 267, 319 (2004). Yet, going well beyond *Storer*, the Second Circuit's decision effectively requires candidates to have either direct, unmediated access to rank-and-file party members or a reasonable chance of convincing elected delegates to award them the nomination, *i.e.*, a reasonable chance to win. But this Court has never found either such right to exist.

Instead, the equivalent of ballot access in this case is convention access, *i.e.*, the right to have a candidate's name put up for consideration by the delegates.

A. In The Arena Of Intraparty Competition, Where There Is No Concern About Freezing Out Political Views, The *Storer* Line Of Ballot Access Cases Does Not Apply

The Court's line of ballot access cases that includes *Williams v. Rhodes*, 393 U.S. 23 (1968), *Anderson v. Celebrezze*, 460 U.S. 780 (1983), *Jenness v. Fortson*, 403 U.S. 431 (1971), and *Storer*, does not confer upon insurgent party candidates a right to a "realistic opportunity to participate." Pet. App. 41-44. First, *Williams*, *Anderson* and *Jenness* all involved *interparty* competition and addressed the issue of whether the election schemes at issue were designed to "*freeze out*" minor party candidates and non-party, independent candidates from the political process by effectively denying them general election ballot access. Those cases concerned the silencing of political views by excluding political parties or independent candidates, and thus have no application to the present controversy, which concerns the scope of the rights of a candidate or voter *within a party*. *See Williams*, 393 U.S. at 31 ("[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot"); *Anderson*, 460 U.S. at 787 ("[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment," *id.* at 793; *Jenness*, 403 U.S. at 439 (distinguishing *Williams*, in part, because challenged statute "in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life").

Second, far from articulating a different standard, *Storer* is just another variation of a *Williams* "freeze out"

case. In *Storer*, the Supreme Court was asked to determine the constitutionality of, among other statutes, a provision that required independent candidates to collect signatures from five percent of the total votes cast in California at the last general election (approximately 325,000 signatures) within a 24-day period. 415 U.S. at 738-40. In that context, the Court posed this question: "could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?" *Id.* at 742. Specifically, the Court emphasized that "to comply with the First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot. No discernible state interest justified the burdensome and complicated regulations that in effect made impractical any alternative to the major parties." *Id.* at 746.

Thus, this Court's "freeze out" decisions, and in particular, the standard set forth in *Storer*, were not intended to apply to election systems governing party nominations, as intraparty competition does not implicate the danger of "confer[ring] an effective political monopoly on the two major parties." *Storer*, 415 U.S. at 729; *see also Anderson*, 460 U.S. at 794 ("[i]n short, the primary values protected by the First Amendment . . . are served when election campaigns are not monopolized by the existing political parties"). Arguably, the most that can be said about the *Storer* line of cases is that a party or candidate running as an independent has a right to access the general election ballot, not that any particular candidate within a party has such a right.

Nor does *Bullock v. Carter,* 405 U.S. 134 (1972) support a standard based on "meaningful participation." Pet. App. 163. In *Bullock*, the Court struck down under the Fourteenth Amendment a statute in Texas which required prospective candidates to pay an exorbitant filing fee to participate in primary elections. *Bullock*, like *U.S. v. Classic*, 313 U.S. 299 (1941), where Commissioners of Elections for Louisiana were indicted for willfully altering and falsely counting and certifying the ballots of voters in

the primary election for a congressional candidate, merely establishes a proposition that is not in dispute here: the state action requirement for triggering constitutional protection against invidious discrimination is satisfied at the nominating phase.[13] Unlike *Bullock*, which involved exclusionary filing fees, or *Classic*, which involved ballot tampering, or even *Terry v. Adams*, 345 U.S. 461 (1953), which involved racial discrimination – all of which were decided on Fourteenth Amendment or even Fifteenth Amendment grounds – this case involves none of these invidious practices and raises only voting and associational rights under the First Amendment. Of course, if the challenged provisions were discriminatory, such as in the notorious "white primary" cases (*e.g.*, *Terry*) or the exclusionary filing fees struck down in *Bullock* and in *Lubin v. Panish*, 415 U.S. 709 (1974), they would be unconstitutional under the equal protection clause. But quite to the contrary, the evidence below showed that the convention system effectively advances the important state interest of diversity. *See infra* 40, 46.

B. To The Extent The *Storer* Test Applies To Intraparty Competition, At Most, Voters And Candidates Are Only Entitled To Access The Nominating Process The State Adopts

To the extent the *Storer* test does apply to the nomination phase, the test at most would grant a reasonably diligent candidate the opportunity to access the nominating convention, *i.e.*, having a chance to put his or her name up for consideration by the delegates. But it is clear from the Second Circuit's distorted application of the *Storer* test that it measured the scope of the First Amendment right due to so-called "challenger" candidates and voters from the constitutionally impermissible standpoint of: (1) a

[13] While the state action requirement is undoubtedly triggered at the nominating phase of New York judicial election system, not all activity associated with the nominating phase necessarily constitutes state action, as discussed *infra* at 40.

candidate's likelihood of success in obtaining a party nomination; and (2) whether a candidate has direct, unmediated access to voters. The Second Circuit erroneously equated the right to *access* the general election ballot in *Storer* with either the right to *win* a party nomination outright or the right to have direct access to voters. But this Court has never found either such right to exist.

As a threshold matter, the Second Circuit conducted its constitutional analysis from the inherently-flawed perspective of the so-called "challenger candidate" – a paradigm never recognized by this Court. The Court of Appeals defined a "challenger candidate" as a reasonably diligent candidate who lacks the support of the political party leadership. But this definition is circular: no "challenger candidate" could ever capture the party nomination because upon attaining party support, the candidate would lose his or her "challenger" status. At the outset, *all* candidates start out on the same square and inevitably some candidates win party support, while others do not. The Court of Appeals failed to recognize that by the end of the nomination process, party leaders almost always rally behind the likely winners.[14] In any event, the fact that elected party leaders help to shape the party's support of particular candidates is not a description of a constitutional problem, but merely of their function as party leaders.

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[14] *See* Tr. 1580:20-1581:1, 1581:19-21, 1663:15-22 (Kellner); Tr. 1292:10-21 (Schiff); Tr. 1768:4-14 (Freedman). As one party leader described it over a decade ago, "[i]t's almost like picking a winner of a horse race after the race." Tr. 1663:15-22 (Kellner); *see also* Tr. 1286:20-1287:11, 1292:22-1293:7 (Schiff). Plaintiffs' own witness, John Carroll, testified that several insurgent candidates have been nominated. *See* Tr. 488:6-489:12 (Carroll). Petitioners also presented the testimony of six sitting Justices who were able to win delegate support and win the nomination, including in instances where they initially faced the opposition of party leaders. Tr. 1807:3-12, 1814:21-1815:13, 1816:13-1817:19 (Gangel-Jacob); Tr. 1963:22-1968:8, 1967:17-1968:5, 1980:10-15 (Schlesinger); Tr. 1763:18-1770:12 (Freedman); 1863:25-1864:7, 1881:25-1885:3, 1897:23-1898:2 (Abdus-Salaam); HE 7488-89, 1493:6-12, 1504:1-4 (Sise); HE 6782, 6784-90, 6794-98 (Lunn Dep.).

Nevertheless, going well beyond *Storer*, the Second Circuit affirmed the district court's conclusion that the burdens imposed by the convention were severe at each of the two stages of the convention process – the delegate selection stage and the convention stage. At the delegate selection stage, the court determined that the "challenger candidates" can "never" satisfy the signature requirements for running their own pledged delegates. At the convention stage, the court determined that the possibility of lobbying party-backed delegates is "non-existent." *See* Pet. App. 45. But the equivalent of ballot position cannot be (1) satisfying the signature requirements for running one's own slate of pledged delegates throughout the district or (2) successfully lobbying the chosen delegates.

The first option the Second Circuit identified – running pledged delegates – is deeply problematic because it insists upon the functional equivalent of unmediated access between voters and candidates. The Second Circuit found a severe burden on associational rights at the delegate-selection stage by focusing on how difficult it purportedly would be for a judicial candidate to recruit a full slate of delegate candidates across numerous assembly districts, publicize to all voters those delegate candidates' affiliation, and obtain all the required signatures in every district to get every delegate candidate on the ballot. But, from a constitutional perspective, finding that candidates must have a right to run pledged delegates amounts to a judicial declaration that the only nomination method that satisfies the First Amendment is a primary or its functional equivalent – a result antithetical to *White*, *Cousins*, *La Follette* and this nation's rich history of political conventions. Moreover, the Second Circuit's conclusion that judicial candidates are burdened at the delegate selection stage by the difficulty of assembling a slate of delegates stems from a mistaken understanding of fact: New York's judicial nominating system was never designed to permit judicial candidates to campaign directly to primary voters. As was made clear by Commissioner Douglas Kellner, "the idea that an individual [judicial] candidate would go out and recruit delegate candidates and run delegates pledged

to that candidate in the primary is not the system and it twists the design of the system on its head." Pet. App. 168-69 (citing, Tr. 1567 (Kellner)). Indeed, such a requirement would defeat the intention of New York's legislature, which crafted a system where party representatives are delegated the authority to vote for *multiple* judicial candidates, not conscripted to vote for just one, and judicial candidates are supposed to address their campaigning to unaffiliated delegates at the convention.

The second option – *successful* lobbying of delegates at the convention stage – amounts to winning the nomination, not merely competing for it. Even the Second Circuit implicitly acknowledges that a right to win standard would be constitutionally erroneous. *See* Pet. App. 45. Yet, the Second Circuit rests its decision on the district court's determination that it is practically impossible for disfavored candidates to lobby delegates because of the influence of party leaders. *See* Pet. App. 45-46. While Petitioners dispute that premise, even assuming its validity, the fact that the Second Circuit relied upon convention outcomes in rendering its decision demonstrates just how far the lower court departed from established First Amendment law. Would the outcome have been different if party leaders were less influential or if delegates had maverick tendencies? Faithfully applying the same analytical approach to primaries could lead to a finding of unconstitutionality where as a practical matter party leader support frequently dictates the outcome. *See* Pet. App. 192-94 (concluding primaries for civil court are an illusion of democracy). At bottom, the Court of Appeal's fundamental objection is that state party leaders recommend preferred candidates to the convention delegates and the delegates often accept these recommendations. But this objection cannot possibly mean that New York's election law is unconstitutional. It is an unalterable political reality in all systems that party leaders can and should have enormous influence over the selection of candidates.

In bending the *Storer* test to fit the unintended context of intraparty competition, the Second Circuit

would change the meaning of *Storer* entirely. At most, *Storer* stands for the proposition that reasonably diligent candidates should be given an opportunity to enter the race, not that the rules should be adjusted to improve their odds of winning. To the extent this Court's ballot access decisions offer any insight into the constitutionality of the inner-workings of intraparty competition, the principle that they espouse is merely the right to access the electoral system instituted by the state. Here, where there is no candidate ballot at the nominating stage precisely because there is a convention system in lieu of a primary, the proper equivalent to ballot access is *convention access*, *i.e.*, having a chance to put one's name up for consideration at the convention.

In *Jenness*, where the issue involved a Georgia election law that required independent and minor-party candidates to file nomination petitions signed by at least five percent of registered voters in the previous election to be listed on the general election ballot, 403 U.S. at 440, the Court's analysis focused on whether a candidate could "[get] his name printed on the ballot." In *Lubin*, 415 U.S. at 718, the Court merely established an indigent candidate's right to ballot access in the face of a mandatory filing fee statute which "operate[d] to exclude some potentially serious candidate from the [primary] ballot." In *Storer*, the Court found that the availability of a write-in alternative for independent and minor party candidates did not make it "virtually impossible" for new candidates and parties to achieve ballot access. 415 U.S. at 728 (quoting, *Williams*, 393 U.S. at 25). And in *Munro v. Socialist Workers Party*, 479 U.S. 189, 197 (1986), while the challenged provision made it more difficult for the Socialist Workers Party to access the ballot, the Court held that the state "was not required to afford . . . *automatic access* and would have been entitled to insist on a more substantial showing of voter support" before a candidate's name appeared on the ballot. (Emphasis added).

In every one of those cases, the minor party or independent candidates were clamoring for access to the general election ballot even though they had no realistic

chance of winning the election. By denying those candidates the opportunity to place their names on the general election ballot, they were "excluded" from even being *considered* for election to office. These cases do not remotely support the notion that "disfavored major-party candidates," Pet. App. 60, have a constitutional right to appeal the determination of party representatives by going directly to rank-and-file members. Indeed, as this Court has recognized in *Clements v. Fashing*, 457 U.S. 957 (1982), there is no fundamental right to be a candidate in the first place. 457 U.S. at 963 ("Far from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny' ") (quoting *Bullock*, 405 U.S. at 143).

III. THE SECOND CIRCUIT ERRED IN APPLYING STRICT SCRUTINY TO NEW YORK'S STATUTORY SCHEME RATHER THAN BALANCING THE CONSTITUTIONAL INTERESTS AT STAKE

Even if New York's judicial convention, by filtering rank-and-file preferences through elected delegates, were considered to impose a significant burden on First Amendment rights (which it does not), it was still basic error for the Second Circuit to apply "strict scrutiny." Under that exacting standard, the starting – and effectively ending – point of the analysis was the purported burdens imposed on the First Amendment rights of challenger candidates and their supporters.

But the applicable constitutional test requires a balancing of the competing First Amendment rights at stake, not the application of strict scrutiny. Giving equal consideration to both sides of the constitutional equation, New York's system readily passes muster. The judicial convention advances the important First Amendment right of the party and its members to associate with candidates who, the party has determined, reflect the party's ideals. While the Second Circuit claimed to have considered the First Amendment rights of political parties,

and balanced those rights directly against the rights of voters and candidates, it is clear that the Court of Appeals applied *Anderson's* strict scrutiny test in a one-sided fashion and, by doing so, improperly subordinated the First Amendment rights of political parties to those of voters and candidates. Thus, the Second Circuit demanded that New York's statutory scheme be narrowly tailored to serve a compelling interest. In its analysis, the Second Circuit "decline[d] to recognize" what it characterized as "a compelling state interest in allowing political parties to exclude their own members from the nominating component of the state-run elective process at issue here." Pet. App. 71. Not only did the Second Circuit apply the wrong test, but it significantly overstated the extent to which the New York system impinges upon the constitutional rights of both candidates (who have no right to run for office and in any event are not prohibited from doing so under New York law) and voters (who have no right to vote for particular candidates and can freely participate in both the delegate primary and the candidate general election). The Second Circuit also failed to give appropriate deference to the judgment of New York's legislature which has long recognized the substantial state interests the convention system serves.

A. Where There Are Competing Constitutional Rights The Court Applies A Balancing Test

These circumstances – in which a law implicates constitutional interests on both sides of the equation, neither dramatically out of proportion to the other – do not call for the mechanical application of "strict scrutiny" where one set of rights is arbitrarily elevated over all others. Rather, this Court's precedents direct the Court to assess and balance all of the interests at stake, giving substantial deference to the legislature's own considered determination of that question. The core holding of the Court of Appeals to the contrary is erroneous.

Where competing First Amendment or other constitutional rights are implicated, the Court has eschewed any

presumption of unconstitutionality in favor of a balancing test. *See Frisby v. Schultz,* 487 U.S. 474, 485-88 (1988) (balancing rights of privacy and expression); *Rowan v. U.S. Post Office Dept.,* 397 U.S. 728, 736 (1970) (same); *Turner Broad. Sys., Inc. v. F.C.C.,* 520 U.S. 180, 192-94 (1997) (recognizing the speech interests of both viewers and cable operators); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 102 (1973) ("Balancing the various First Amendment interests involved in the broadcast media . . . is a task of a great delicacy and difficulty"); *Red Lion Broad. Co. v. F.C.C.,* 395 U.S. 367, 389-90 (1969) (holding that First Amendment permits the FCC to restrict the speech of some to enable the speech of others); *accord Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., concurring) ("What this Court has called 'strict scrutiny' – with its strong presumption against constitutionality – is normally out of place where, as here, important competing constitutional interests are implicated"); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) (explaining that when a law significantly implicates *competing* constitutionally protected interests, this Court has "scrutinized the statute's impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality. Rather, it has balanced interests.").

This Court has also recognized the need to balance competing interests surrounding elections. For example, this Court found in both *California Democratic Party v. Jones* and *Tashjian* that the injury to the associational rights of parties can far exceed the need to protect the right to vote. *See Jones*, 530 U.S. at 573 n. 5 (determining that the injury to party associational rights greatly outweighed an ostensible "'fundamental right' of citizens 'to cast a meaningful vote for the candidate of their choice.'") (internal citation omitted); *Tashjian*, 479 U.S. at 221-22) (holding that "[t]he State's legitimate interests in preventing voter confusion and providing for educated and responsible voter decisions in no respect make it necessary to burden the Party's rights.") (internal quotation and citation omitted).

The Fourth and D.C. Circuits have recognized the need to balance the competing rights of political parties and rank-and-file voters in the specific context of delegate-based conventions. In *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (*en banc*), registered Republicans in numerous states challenged the constitutionality of the delegate allocation formula adopted by the National Republican party for its 1976 convention as violating the principle of "one-man, one-vote." *Id.* Although the court upheld the constitutionality of the formula primarily on equal protection grounds, the court also found that "[t]o the extent that voting rights are involved, warranting close judicial scrutiny, these rights are offset by the First Amendment rights exercised by the Party in choosing the formula it did." *Id.* at 588. While the *Ripon* court acknowledged that the right to vote is implicated in the nomination process, it held the "view that, as between that right and the right of free political association, the latter is more in need of protection in this case . . . the right to organize a party in the way that will make it the most effective political organization seems clearly at stake here." *Id.* at 586. Ultimately, the court applied what was effectively a rational basis balancing test, as it concluded that there was no equal protection problem because "the representational scheme and each of its elements rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals." *Id.* at 586-87.

Relying on this Court's *Columbia Broadcasting* decision, the D.C. Circuit determined that the rights of voters must not come at "the price of interference" with the rights of political parties. *Id.* at 586 n. 61. The court explained that where the "two conflicting constitutional rights" of voters and political parties are at stake, voting rights are not entitled to heightened protection by the state or government as they might otherwise be in the absence of the countervailing rights of political parties. *Id.* (citations omitted). Balancing the party's First Amendment rights against the voters' rights, the circuit court

upheld the constitutionality of the party's rule governing delegate selection as related to a rational purpose.

More recently, in *LaRouche v. Fowler*, 152 F.3d 974, 994-95 (D.C. Cir. 1998), the D.C. Circuit held that strict scrutiny does not apply when a putative candidate's or voter's First Amendment rights are pitted against a political party's First Amendment rights. When asserted First Amendment interests conflict, applying rational basis review rather than strict scrutiny "best effectuates the Supreme Court's direction to approach judicial intervention in this area 'with great caution and restraint,' and to recognize 'the large public interest in allowing the political processes to function free from judicial supervision.'" *Id.* at 995 (quoting *O'Brien v. Brown*, 409 U.S. 1, 4-5 (1972)). Indeed, in *LaRouche* the D.C. Circuit rejected a challenger candidate's First Amendment challenge even though the party completely excluded delegates supporting the candidate from the nominating convention. 152 F.3d at 995-96.

In *Bachur*, the Fourth Circuit also employed a balancing test in upholding a party rule that required delegate votes to be allocated evenly based on gender. In finding no First Amendment violation, the Fourth Circuit began its analysis with the rights of political parties, noting that it had been settled by the Supreme Court in *Cousins*, 419 U.S. at 487, that "a political party has a right of political association protected by the First and Fourteenth Amendments, and that right of association carries with it a right to determine the party's own criteria for selection of delegates to the national convention." *Bachur*, 836 F.2d at 841. Indeed, the court even recognized that a party could choose to adopt a closed, delegate-based convention system, as has New York's legislature, in which voters have "no direct voice" and "popular" preference may only be "partially translated into the actual nomination" rather than "wholly determinative of the outcome." *Id.* at 842. Ultimately, the court concluded that "the limited restriction [placed] on Bachur's right to vote for delegates" did not unconstitutionally infringe upon his right to vote when "balanced" against the "broad, encompassing" First

Amendment rights of parties. *Id.* The Fourth Circuit upheld the constitutionality of the representational scheme because it "rationally advance[d] some legitimate interest of the party" in promoting female participation in party affairs. *Id.* (quoting *Ripon*, 525 F.2d at 586-87).

Here, even the Second Circuit recognized that none of the precedents it cited in support of its application of strict scrutiny involved "a scheme *identical* to New York's unique judicial selection process." Pet. App. 42 (emphasis added). Indeed, this case is different from those not merely in degree, but in kind. Those precedents each involved schemes that limited voters' access to the electoral process *without* furthering any substantial countervailing interest, such as the associational rights of political parties. *See id.* 42-45 (citing *Williams* (Ohio law effectively limited presidential ballot to major party candidates); *Bullock* (Texas law effectively limited nomination to wealthy candidates); and *Anderson* (Ohio law imposing exceptionally early filing deadline limited late-entering candidates)). When, as here, the challenged statute furthers important constitutional rights, the interests on both sides of the equation must be assessed and balanced. As we now show, the New York system directly furthers the constitutional rights of political parties and their members, and does not do so out of proportion to the burden on insurgent candidates and voters. The statute accordingly passes constitutional muster.

B. New York's Electoral System Directly Furthers The Constitutional Rights Of Political Parties And Their Members To Associate And Choose Candidates

As is true of nearly all electoral systems, New York's statutory scheme for electing judges contemplates that political parties will exercise substantial control over the candidate selection process. Facially, the party's rules determine the number of delegates and alternates it may elect in each assembly district. N.Y. Elec. L. §6-124. In practice, the party's leadership exerts substantial influence over the process in many ways including by fielding

delegates and log-rolling or coalition-building to develop a slate of candidates that will best advance the party's interests. Thus, a party exercises its constitutionally protected right of association through both the structure and conduct of the delegate primary and the nominating conventions

The New York statutes directly implicate the well-established principle that a "[p]arty's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Tashjian* 479 U.S. at 224; *see also La Follette*, 450 U.S. at 107. Indeed, "[i]n *no area* is the political association's right to exclude *more important* than in the process of selecting its nominee." *California Democratic Party*, 530 U.S. at 575 (emphases added).

This Court has repeatedly vindicated the right of parties to define the scope of their membership, and to determine and even to designate who within the party should be entrusted to select the parties' nominee. In *California Democratic Party*, the Supreme Court upheld a party's right to define the contours of its association by excluding non-members from its primary. In *Cousins*, the Court held that the right of association carries with it the right to determine the party's own criteria for selection and eligibility of delegates to its national convention, and that the state law governing the qualifications of convention delegates could not prevail over a national party's conflicting rules. Thus, the Court upheld the party's delegate slate, which was chosen in a private caucus, while disqualifying the competing slate which was popularly elected through a statewide primary. And again, in *La Follette*, the Court stressed that the party had a First Amendment right to determine the makeup of a state's delegation to the national convention. 450 U.S. at 124 ("a political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution") (citing *Ripon*, 525 F.2d at 585). Simply put, there is no constitutional right of "qualified party members" to participate in candidate selection. Pet. App. 54. Rather,

the Court has expressed a consistent preference for safeguarding the party's right to organize itself as it sees fit and to select the best candidate, including the right to insist on only having locally elected party representatives (*i.e.*, delegates) choose their nominees to the exclusion of all rank-and-file members.

The Court of Appeals decision cannot be reconciled with the long history of party control over candidate nominations. The party is entitled to enhance its chances of winning elections by picking candidates who can become "ambassador[s] to the general electorate in winning it over to the party's views." *California Democratic Party*, 530 U.S. at 575; *see also La Follette*, 450 U.S. 107); *Cousins*, 419 U.S. 477 (1975). In addition, the party has the associational right to select a candidate "who best represents the party's ideologies and [political] preferences." *California Democratic Party*, 530 U.S. at 575 (citing *Eu*, 489 U.S. at 224). The Second Circuit's contrary decision raises the real prospect of "sadd[ling a party] with an unwanted, and possibly antithetical, nominee." *California Democratic Party*, 530 U.S. at 579.

In contrast to the convention's reliance on the informed judgment of delegates guided by party leaders to select candidates, competitive primaries tend to place "a premium . . . not on building coalitions but on mobilizing factions." Truman at 646. The inevitable and undesirable result is "splintered parties and unrestrained factionalism." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 368 (1997) (citing Federalist No. 10 (Madison), quoting *Storer*, 415 U.S. at 736). Historically, primaries have increased strife within parties, "a form of independence which probably profits the public very little." Ralph Boots, *The Trend of the Direct Primary*, 16 Am. Pol. Sci. Rev. 424, 427 (1922). Unlike conventions, primaries have not fostered local party leadership and cohesion, "pushing toward the disintegration of the party." Reynolds at 7; *see also* Truman at 650. Instead of encouraging the development of a strong party network, primaries promoted the creation of "personal political machines" devoted to particular candidates. Philipp at 89; *see also* Shafer at 99.

Unlike primaries, New York's system also furthers the associational rights of political parties by allowing them to balance slates of candidates along geographic, racial, ethnic, and gender lines. Such balance is "in the party's 'interest'" because it permits the party to satisfy and represent diverse constituencies. Tr. 2121:9-14 (Connor). For instance, a judicial candidate from Staten Island would have difficulty winning a primary election in the Second Judicial District because the voters are clustered in Brooklyn. Tr. 2124:4-22 (Connor). However, failure to have a candidate from Staten Island on the ticket would hurt the party in that borough in the general election. Tr. 2103:2-17 (Connor). This problem is averted through the balanced ticket assembled at the convention. Likewise, the convention system helps parties win elections by allowing them to offer racially and ethnically balanced groups of candidates. Tr. 2103:25-2104:24 (Connor).[15]

Ultimately, the lower courts' objection is that party leaders recommend preferred candidates to the convention delegates and delegates often accept these recommendations. But this is as it should be. Indeed, it is fundamental to party politics that, in governing itself, party leaders organize the rank-and-file, set goals, and endorse candidates who they feel best advance the goals of the party. These activities cannot render an otherwise valid electoral statute unconstitutional. Indeed, while the Second Circuit blithely sweeps basic party activities into the ambit of state action, it is far from clear that the conduct of individual party leaders constitutes state action subject to constitutional scrutiny.

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[15] In 2001, 19.2 percent of Supreme Court Justices across the state were racial or ethnic minorities, even though the pool of persons eligible to be candidates (attorneys in practice for ten years) was only 8.2 percent minority. HE 7667-70 (Ex. NNN); HE 7646-49 (Ex. LLL). Notably, in the First Judicial District, where only 6.81 percent of the eligible pool consisted of minority attorneys, 44.7 percent of Supreme Court Justices were minorities. HE 7667-70 (Ex. NNN).

Even assuming it is state action, a constitutional claim that party leaders have "too much" influence over the party's nomination process presents the same kind of intractable difficulties found in political gerrymandering claims that have lead several members of this Court to conclude that such claims are nonjusticiable, and prevented the remaining members from agreeing on a manageable standard for deciding them. *See e.g.*, *Vieth*, 541 U.S. at 277-305. If some exercise of party leadership in the nomination process is permissible – even constitutionally protected – then should courts decide how much is too much? Being drawn into this political thicket without the possibility of devising manageable decisional standards would only lead to the federal judiciary imposing its unconstrained policy choices on political parties, to the grave detriment of both the political process and the judiciary's reputation and independence.

Though the Second Circuit in this case discounted the parties' interests, it ultimately was willing to acknowledge that "parties do retain the right to select a preferred candidate and advocate on her behalf," and "agree[d] that protecting those rights is a compelling state interest." Pet. App. 71. But it concluded that New York's system "is not narrowly tailored to achieve that end" in light of supposedly "less onerous means" to accomplish that goal. *Id.* Had the Court of Appeals applied the appropriate balancing test, rather than strict scrutiny, its begrudging recognition that the statute furthered a compelling state interest would have been determinative. It should be in this Court.

C. There Is No Significant Burden On The First Amendment Rights Of Voters And Candidates Who Have Access To The Convention System

There are no significant barriers under New York's electoral scheme for either voters or candidates, at either the delegate selection stage or the subsequent convention stage. With respect to candidates, at the delegate selection stage the only candidates are the delegate candidates.

Judicial candidates have no role at this stage. Anyone who wants to do so can run for delegate in the delegate primary. Delegate candidates may enter to run in the delegate primary simply by collecting 500 signatures from registered party voters. This modest signature requirement poses no significant burden and has repeatedly been upheld. *See e.g.*, *Prestia v. O'Connor*, 178 F.3d 86 (2d Cir. 1999) (upholding the constitutionality of N.Y. Elec. L. §6-136). As discussed above, the courts below overlooked this fact, instead creating an unintended role for judicial candidates by seizing on the idea that judicial candidates should be able to assemble and run their own delegate slates.

As for voters at the delegate selection stage, they have the unfettered right to vote for any would-be delegates who fulfill the modest signature requirement. Thus, voters may elect delegates of their choosing who share their interests and values, and will advance them in the convention process. An individual voter's opportunity to cast a ballot for his preferred delegate fully vindicates that voter's First Amendment rights irrespective of whether there is any realistic chance that the delegate himself will be elected, let alone have his preferred judicial candidate nominated at the convention. *See Cousins*, 419 U.S. at 489.

At and leading up to the convention stage, judicial candidates can lobby delegates for support. Delegates, in turn, may support, and propose for nomination, any candidate he or she likes.[16] The nominating convention affords voters no direct role in the selection of the party's nominee at the convention stage, whose interests are represented by the delegates the voters elected at the delegate selection stage. Voters, of course, ultimately have

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[16] Tr. 235:3-14 (Berger); Tr. 521:3-22, 540:13-541:7 (Carroll); Tr. 1261:25-1262:6 (Schiff); Tr. 1325:24-1326:2 (Ward); Tr. 1583:10-13, 1583:18-20 (Kellner); Tr. 1986:25-1987:2, 1993:17-19 (Giske); Tr. 1947:11-21 (Allen); Tr. 2088:12-22 (Connor).

an opportunity to cast their ballots for judicial candidates at the general election.

Thus, if this Court accepts the inherent design of a true delegate-based convention system as being consistent with the Constitution, in light of the intended roles of voters, delegates and judicial candidates, respectively, it is clear that New York's statutory scheme for electing Justices of the State Supreme Court does not impose severe burdens on the right to vote. Indeed, none of the structural barriers for voters and candidates that have led this Court to strike down state ballot access laws is present here.

Moreover, while the issue here concerns access to the nominating phase, this Court has repeatedly instructed that the alleged burdens imposed by state election statutes must be viewed in the totality of the state's electoral scheme. In this respect, the Court has repeatedly looked to whether challenged electoral schemes provide alternative means for accessing the ballot.[17] Here, New York's electoral scheme provides reasonable alternative means of access to the general election ballot. Far from being irrelevant, the general election is the only stage in this electoral process where voters are given a direct opportunity to express their preferences for particular candidates. To the extent particular candidates have any intended right to appeal

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[17] *See e.g., Jenness*, 403 U.S. at 440 (determining that Georgia's election laws served to ensure reasonably open access to the ballot because "alternative routes are available to getting his name printed on the ballot," including entering a party primary or circulating nominating petitions as an independent candidate); *Storer*, 415 U.S. at 737 n. 7 (sustaining party-disaffiliation requirement, as independent candidates who failed to qualify for the ballot could "nevertheless resort to the write-in alternative provided by California law"); *Lubin*, 415 U.S. at 718 (candidates excluded by filing fee lacked alternative means of coming before the voters); *Burdick v. Takushi*, 504 U.S. 428, 439 (1992) (holding that Hawaii's ban on write-in voting imposed only a "limited burden" on voters because adequate alternative ballot access existed); *Munro*, 479 U.S. at 199 ("[i]t can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election").

directly to voters, that right arises only at the general election stage and is fully provided by ready access of individual candidates to alternative paths to the general election ballot. *See* N.Y. Elec. L. §6-138 (petitioning directly onto the general election ballot by gathering 4,000 signatures (or 3,500 outside of New York City)); N.Y. Elec. L. §§1-104 and 6-106 (running as a minor party candidate, as lead plaintiff Lopez Torres did on the Working Families Party's ticket); N.Y. Elec. L. §§7-104(7) and 7-108(8) (having a vote cast as a write-in candidate).

D. The Convention Furthers Other Weighty Governmental Interests And The Court Should Defer To The Considered Judgment Of New York's Legislature In Crafting It

In applying the constitutional balancing test, the Court should give due deference to the careful policy choice of New York's legislature in adopting it. "Where a legislature has significantly greater institutional expertise as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments." *Nixon*, 528 U.S. at 399 (Breyer, J., concurring).

After a failed nine-year experiment with direct primaries in the early twentieth century, New York restored the judicial nominating convention as a means of securing judicial impartiality and public confidence in the judiciary. *See* Pet. App. 9. A well-recognized criticism of competitive primaries is that they "involve[d] heavy expenses both to the public and to the candidates," Penniman at 387, greatly disadvantaging candidates who were not either wealthy or supported by interest groups. Philipp at 90. After carefully considering alternate arrangements on several occasions,[18] the New York legislature has concluded

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[18] *See Report of the Joint Legislative Comm. on Court Reorganization*, Legis. Doc. 24 at 12 (N.Y. 1973) (finding it "undesirable" to change the method of electing Supreme Court judges); Tr. 344:1-12 (Regan) (describing the state's 1967 consideration and rejection of changes to judicial nominating conventions); The Feerick Report at 30.

that judicial nominating conventions are the best mechanism to prevent undignified and expensive judicial campaigns, thereby improving the impartiality of and public confidence in the judiciary. The Feerick Report at 30; Judith S. Kaye, Chief Judge of the State of New York, *The State of the Judiciary* 6 (2006) ("[n]othing is more destructive of public confidence in the impartiality of judges than the need to raise large amounts of money.").[19]

The Second Circuit simply fails to take into account in its decision that the statute at issue in this case governs the nomination of *judges*. As "big money" campaigns for positions on state judiciaries "rapidly spread[ ]," judicial

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[19] *See also The State Convention,* New York Times, May 1, 1917 (editorial urging restoration of judicial nominating conventions); *Miller Declares Primary a Fraud,* New York Times, Oct. 23, 1920 (candidate for governor calls for restoration of nominating conventions for State judges, arguing that primaries lead to the pervasive influence of money and provide a forum for "demagogue[s]"); Tr. 1541:24-1542:20 (Kellner); JA 365 (Kellner Decl. ¶ 18); 24 ABCNY Reports No. 228 at 7-8 (advocating a return to the convention system "thus obviating the undignified methods by which such candidates [were] constrained to seek nomination to election.").

Like New York, many states have balanced the interest in holding judges electorally accountable with the interest in protecting the impartiality and reputation of the judiciary, and decided to restrict popular control over the nomination and election of judges. *See* American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* (2004). Sixteen states have adopted some version of the Missouri Plan. *Id.*; Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. Rev. 689, 724 (1995). Under this plan, judges are initially appointed. Croley at 724; American Judicature Society. Subsequently, the judges stand for unopposed retention elections; voters can choose to recall the judge, but cannot choose a replacement. *See Republican Party of Minn.*, 536 U.S. at 791 (O'Connor, J., concurring). In two other states, Illinois and Pennsylvania, candidates for judicial positions initially compete in partisan elections, but stand for retention elections for subsequent terms. *See* American Judicature Society. Still other states have nonpartisan judicial elections, or do not allow for popular election of judges at all. *Id.*

candidates in states with direct primaries and popular elections are forced into fund-raising races. Brennan Center for Justice, *The New Politics of Judicial Elections 2004* 13. The average cost of a successful campaign for a state supreme court position increased 45 percent, to over $650,000, from 2002 to 2004 alone. *Id.* This rise in the cost of campaigns makes judicial candidates ever more dependent on donors, and can "leave judges feeling indebted to certain parties or interest groups." *Republican Party of Minn.*, 536 U.S. at 790 (O'Connor, J., concurring). Because the judiciary's legitimacy "ultimately depends on its reputation for impartiality," *Mistretta v. United States*, 488 U.S. 361, 407 (1989), due process disallows even the appearance of bias: "to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955) (internal citation omitted). By eliminating costly and unseemly primary campaigns, New York's convention system advances its significant interest in ensuring impartiality and "properly protect[ing] the judicial process from being misjudged in the minds of the public," *Cox v. Louisiana*, 379 U.S. 559, 565 (1965).

In addition to enhancing judicial independence and confidence in the judiciary, the convention system promotes the State's interest in enhancing racial, ethnic and gender diversity on the bench and ensuring broad geographic representation.[20] In this regard, the trial record was replete with both statistical and anecdotal evidence demonstrating the diversity of New York's trial court bench under the convention system.[21] Likewise, the

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[20] *See* Feerick Report at 30 ("In contrast to primaries, which are able to grant victory only to majority vote getters, conventions allow member of geographic and other minority factions to build coalitions to win a spot on the ballot."); HE 4917-4980 at 4934-35, 4953-56, 4964-65 (Expert Report of Prof. Michael Hechter).

[21] HE 7667-70 (diversity chart comparing number of justice to lawyers admitted at least 10 years); Tr. 1343:23-1344:1, 1345:24-1346:2 (Ward); 2031:10-15 (Allen); Tr. 1889:4-1890:4 (Abdus-Salaam). *See also amicus curiae* brief supporting certiorari by the Mid-Manhattan Branch

(Continued on following page)

evidence showed that the convention system allowed smaller counties ranging from Hamilton County to Richmond County to gain significant representation on the bench whereas in primaries they would be dominated by the largest counties in each judicial district.[22]

IV. THE REMEDY WAS NOT NARROWLY TAILORED TO REPAIR THE PURPORTED CONSTITUTIONAL DEFECT IN LIGHT OF LEGISLATIVE INTENT

If some form of a true delegate convention must be constitutionally permissible, as *White* requires, then the lower courts should not have completely dismantled New York's chosen election method and replaced it with a primary as an "interim" remedy. Instead, consistent with this Court's directive in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), the remedy should have been narrowly tailored to fit the purported constitutional defect in light of legislative intent.

The Court has cautioned that in remedying a constitutional flaw in a statute, courts should avoid "'rewrit[ing] state law to conform it to constitutional requirements.'" *Ayotte*, 546 U.S. at 329 (quoting *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)). "[T]he touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.'" *Ayotte*, 546 U.S. at 330 (citation omitted). Yet, that is precisely what the lower courts here did.

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of the NAACP and the Metropolitan Black Bar Association; *amicus curiae* brief supporting certiorari by the Asian American Bar Association of New York; Second Circuit *amicus curiae* brief by the Women's Bar Association of the State of New York.

[22] HE 4942, 4953-56, 4964-65, 4980 (Hechter Report); Tr. 1224:1-7 (Hechter); JA 126-27, 129-30 (Sise Decl.); Tr. 1495:25-1498:3, 1514:14-1515:4 (Sise). *See also* Second Circuit *amicus curiae* brief by the Richmond County Bar Association.

While the Second Circuit was not explicit about whether it purported to set aside New York's system for electing Supreme Court Justices on a facial or as-applied basis, the injunction it upheld barred the Defendants from enforcing New York Election Law §6-106 and from using the procedures set forth in §6-124 and ordered that "the nomination of Supreme Court Justices shall be by primary election until the legislature of the State of New York enacts a new statutory scheme." Pet. App. 185. It thus effectively invalidated the statutes entirely, restrained the State from sanctioning any form of judicial nominating convention for the office of Supreme Court Justice, and rewrote State law to impose a primary.

This injunction eviscerates, not just circumvents, the Legislature's intent in choosing a convention process for selecting party candidates. In upholding this remedy, the Second Circuit made plain that it would consider nothing short of the installation of a direct primary to be constitutional, in direct conflict with this Court's decision in *White*. Thus, the Second Circuit chose to thwart the Legislature's choice.

Rather than disregard the Legislature's express intent to *avoid* primaries, the lower courts should have tailored the remedy to address the conventions' purportedly offending features, while still preserving the convention system itself. Courts should seek "not to nullify more of a legislature's work than is necessary." *Ayotte*, 546 U.S. at 329. "[T]he 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'" *Id.* (internal citation omitted). Several remedial options exist that would have done far less violence to the Legislature's choice than the mandatory injunction entered by the district court. Among other things, the Second Circuit could have considered: (1) reducing the number of petition signatures required; (2) decreasing the number of delegates; (3) extending the time period before the convention to give more time for candidates to lobby and delegates to deliberate; and (4) ordering the political parties to allow candidates to address the

convention. *See* Feerick Report at 30-36. Instead of demolishing an entire electoral system, the Second Circuit should have simply set aside any provisions of the statutory scheme that it found problematic and allowed the Legislature to remedy those particular aspects of the statutes.

This error is all the more egregious given the strong interests that states, as sovereigns, have in crafting their own election procedures. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992). At bottom, the judgment about the best way to nominate judicial candidates is a choice best made by a legislature answerable to the electorate, rather than a federal court. *See id.*

CONCLUSION

For the foregoing reasons, this Court should reverse the United States Court of Appeals for the Second Circuit.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I to the Constitution of the United States:

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

New York Election Law

§ 6-106: Party nominations for the office of justice of the supreme court shall be made by the judicial district convention.

§ 6-124: A judicial district convention shall be constituted by the election at the preceding primary of delegates and alternate delegates, if any, from each assembly district or, if an assembly district shall contain all or part of two or more counties and if the rules of the party shall so provide, separately from the part of such assembly district contained within each such county. The number of delegates and alternates, if any, shall be determined by party rules, but the number of delegates shall be substantially in accordance with the ratio, which the number of votes cast for the party candidate for the office of governor, on the line or column of the party at the last preceding election for such office, in any unit of representation, bears to the total vote cast at such election for such candidate on such line or column in the entire state. The number of alternates from any district shall not exceed the number of delegates therefrom. The delegates certified to have been

elected as such, in the manner provided in this chapter, shall be conclusively entitled to their seats, rights and votes as delegates to such convention. When a duly elected delegate does not attend the convention, his place shall be taken by one of the alternates, if any, to be substituted in his place, in the order of the vote received by each such alternate as such vote appears upon the certified list and if an equal number of votes were cast for two or more such alternates, the order in which such alternates shall be substituted shall be determined by lot forthwith upon the convening of the convention. If there shall have been no contested election for alternate; substitution shall be in the order in which the name of such alternate appears upon the certified list, and if no alternates shall have been elected or if no alternates appear at such convention, then the delegates present from the same district shall elect a person to fill the vacancy.